

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

THERMAL REDUCTION COMPANY, INC.,)
JOHN WALTON, et al., and JEFFREY)
G. MORRISSETTE pro se,)
Appellants,)
v.)
OLIVINE CORPORATION, and NORTHWEST)
AIR POLLUTION CONTROL AUTHORITY,)
Respondents.)

PCHB Nos. 87-70 & 71

ORDER GRANTING APPELLANTS'
MOTION FOR SUMMARY
JUDGMENT

These appeals have a complex procedural history before the Pollution Control Hearings Board, of which this Summary Judgment and Pre-hearing Motions are only the most recent filings. Appellant John Walton, et al. filed a Motion for Summary Judgment and Affidavit in Support on August 17, 1987, and a Brief and Affidavit in Support on September 23, 1987. Appellant Thermal Reduction Company, Inc., ("Thermal") joined in the Motion and filed a Memorandum in Support on September 22, 1987. Respondent Olivine filed a Pretrial Motion on September 21, 1987, and its Memorandum in Opposition to Summary

1 Judgment with Declarations and documents on October 2, 1987.

2 Appellants filed Responses to Olivine's Pretrial Motion on October 1
3 and 2, 1987.

4 Oral argument was held on October 6, 1987 in Lacey, Washington.
5 Pollution Control Board members present were: Judith A. Bendor
6 (Presiding), Wick Dufford (Chairman), and Lawrence J. Faulk. Present
7 for the parties were attorneys: Robert M. Tull for appellant Thermal,
8 Brent Carson for appellant John Walton, et al., and John Cary for
9 respondent Olivine.

10 The Board has considered the arguments, the above filings and
11 documents on file specifically cited therein, as well as those
12 documents on file recited during oral argument, e.g. an April 10, 1987
13 letter from Northwest Air Pollution Authority ("NWAPA") Control
14 Officer Terry L. Nyman to Mr. Corky Smith, Sr., of Olivine
15 Corporation, and an affidavit of Mike Ruby filed on August 19, 1987
16 with respondent Olivine's Petition for Reconsideration of Stay.

17 DECISION

18 I

19 On the record before us, we conclude, as announced orally to the
20 parties on October 6, 1987, that no genuine issue of material fact
21 exists, and that as a matter of law summary judgment should be granted.

22 We therefore do not reach findings or conclusions on Olivine's
23 Pretrial Motion (e.g. to Strike Affidavits, to Bar Challenges, to
24 State Legal Issues with Greater Specificity, and to Declare that Best
25

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2 Available Control Technology ("BACT") is an issue). Such motion is
3 only relevant if the appeals were to proceed to a hearing on the
4 merits.

5 II

6 By way of brief chronology, on March 3, 1987 Olivine submitted to
7 NWAPA a "Notice of Construction and Application for Conditional
8 Approval to Operate" an incinerator in Whatcom County, Washington
9 State. By April 10, 1987 letter, NWAPA Control Officer Nyman informed
10 Mr. Smith of Olivine in pertinent part that:

11 The information provided with your application was
12 reviewed to determine that all known, available and
13 reasonable methods of air pollution control will be
14 utilized.

15 After considering my recommendation and the comments
16 provided at a public hearing, on this matter, the Board
17 of Directors of the NWAPA granted approval at their April
18 8, 1987, meeting to grant a conditional approval. This
19 approval is contingent upon your payment of the required
20 \$100.00 plan, examination and inspection fee, \$43.50
21 legal publication cost, and the following conditions:

- 22 1. Experimental burning shall be limited to sixty (60)
23 days. [. . .]
- 24 2. Burning capacity shall be limited to 50 tons per day,
25 averaged over any seven-day period. [. . .]
- 26 3. Experimental burning shall not continue for more than
27 120 days after the first operating day.
- 28 4. Olivine Corporation shall complete the experimental
29 phase of incinerator operation during this period.
30 Experimental operation will not be allowed in the
31 future. Olivine must complete a BACT analysis before
32 a final approval to operate can be considered.
33 [Emphasis added; remaining conditions omitted].

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The letter continues:

[. . .] A "Certificate of Approval to Operate" will be issued after we determine that the process was installed in accordance with the plans and specifications submitted with the application and can operate in compliance with the Regulations of this Authority and the conditions of approval. [Emphasis added].

III

The State Clean Air Act at RCW 70.94.151 states in pertinent part:

If on the basis of plans, specifications, or other information required pursuant to this section, the department of ecology or board determines that the proposed construction, installation, or establishment will be in accord with this chapter, and the applicable ordinances, resolutions, rules, and regulations adopted pursuant thereto and will provide all known available and reasonable methods of emission control, it shall issue an order of approval of the construction, installation, and establishment of the air contaminant source or sources, which order may provide such conditions of operation as are reasonably necessary to assure the maintenance of compliance with this chapter and the applicable ordinances, resolutions, rules, and regulations adopted pursuant thereto. [Emphasis added].

"All known available and reasonable methods of emission control" means BACT. WAC 173-403-030(8).

IV

Furthermore, WAC 173-400-110 states in pertinent part:

Construction shall not commence, on any new source that is required to register per WAC 173-400-100, until a notice of construction has been approved per WAC 173-403-050.

WAC 173-400-100 covers woodwaste incinerators or other incinerators designed for a capacity of 100 pounds per hour or more. Olivine's incinerator, with a burning capacity of 50 tons per day (e.g. 4,167

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pounds per hour), clearly is covered by WAC sections. WAC 173-400-100 and 110. Further, WAC 173-403-050 implements RCW 70.94.152, and both require a determination of BACT prior to operation of a new source.

V

We conclude, reaffirming our October 1, 1987 Order Denying Petition to Reconsider Granting Stay, that the Olivine incinerator is a new source of air contaminants under RCW 70.94.152, despite Olivine's having operated the facility for several years under temporary approvals. We now quote from that earlier Order:

The relevant provisions of RCW 70.94.152 and WAC 173-400-110 have been in existence longer than Olivine's incinerator. A series of temporary approvals cannot be used to bypass the State's new source approval process for a source which has never obtained such approval.
[Order at parag. IX]

VI

NWAPA has not officially concluded that the Olivine incinerator will meet Best Available Control Technology standards. To the contrary, as the April 10, 1987 letter states, NWAPA issued an approval to Olivine to experimentally operate for a limited period of time, under an array of conditions. After completion of the experimental operating period, NWAPA will review the resulting operating data and other information to determine if BACT and other requirements had been met. Even Olivine's own expert, Mike Ruby, concedes in his August 1987 affidavit that BACT has not been demonstrated:

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1 [. . .] I have designed a testing program to determine
2 if the Olivine MSW incinerator . . . meets BACT as it is
3 now designed and, if not, what measures must be taken to
4 bring it up to the BACT standards. [P.4, Parag. 4;
5 Emphasis added].

6 VII

7 NWAPA has issued no Order of Approval pursuant to RCW 70.94.151. Such
8 Approval is a mandatory prerequisite prior to the construction or
9 operation of a new source of air pollution. We therefore conclude that
10 under the State Clean Air Act Olivine currently does not have lawful
11 authority to operate the incinerator in Whatcom County.

12 VIII

13 Olivine urges, however, that it nonetheless has lawful authority to
14 operate under NWAPA Regulation Section 311

15 Section 311 states:

16 The owner or applicant may request a conditional approval
17 to operate for an experimental installation, construction
18 or establishment and said approval may be issued by the
19 Board or Control Officer if it appears to the Board or
20 Control Officer from all submitted information that the
21 installation construction or establishment, when
22 completed, will satisfy the emission standards adopted by
23 the Board. Conditional approval shall be limited to one
24 year maximum and may be renewed by application to the
25 Board or Control Officer.

26 As we previously ruled in our Order Granting Stay (parag. VII) the
27 Board can properly address the validity of a regulation as it is
28 applied to the facts of a particular case. See, Weyerhaeuser Company
29 v. DOE, 86 Wn.2d 310, 545 P.2d 5 (1976).

We reaffirm our conclusions in that Order:

NWAPA's Section 300 makes notice of construction procedures mandatory for all but specifically excluded sources. Olivine's incinerator is not within a category of excluded sources. Under Section 300 an order of approval is to precede construction. No order of approval is to issue unless a determination of BACT has been made. Section 302.1.

As applied in this case, to the extent Section 311 allows Olivine to operate without a prior finding that BACT is provided, that Section not only contradicts the state regulation (WAC 173-400-110), but conflicts with the notice of construction scheme set forth elsewhere in NWAPA's own rules. [Order Granting Stay at parag. V]

IX

The Motion for Summary Judgment is granted due to mandatory procedural requirements of State law applicable to these appeals. This Order in no way addresses the merits. Should NWAPA issue an Order of Approval, and thereafter an appeal is filed with this Board, such issue necessarily awaits another day.

Therefore, the Motions for Summary Judgment are GRANTED.

DONE this 19th day of October, 1987.

POLLUTION CONTROL HEARINGS BOARD

Judith A. Bendor
JUDITH A. BENDOR, Presiding

Wick Dufford
WICK DUFFORD, Chairman

Lawrence J. Faulk 10/19/87
LAWRENCE J. FAULK, Member

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